UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,410	03/10/2004	Duane Langenwalter	10222.0001	4112

22852 7590 03/19/2008

FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP
901 NEW YORK AVENUE, NW
WASHINGTON, DC 20001-4413

EXAMINER	
FERGUSON, MICHAEL P	
ART UNIT	**PAPER NUMBER**
3679	

MAIL DATE	DELIVERY MODE
03/19/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/797,410
Filing Date: March 10, 2004
Appellant(s): LANGENWALTER, DUANE

James W. Edmondson
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed December 20, 2007 appealing from the Office action mailed August 22, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

This appeal involves claims 1-16.

Claims 17-20 have been canceled.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

US 803,741	CARLSON	11-1905
US 6,811,145	GIBBS ET AL.	11-2004
US 1,426,215	RAVERT	08-1922

Affidavit entitled Declaration of Paul L. Gossling, dated November 20, 2006.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2 and 10 are rejected under 35 U.S.C. 102(b) as being anticipated by Carlson (US 803,741).

As to claim 1, Carlson discloses a fencing system comprising:

a plurality of stakes **5** configured to be driven into the ground, each stake including a hollow stake sleeve having an internal diameter (a plurality of stakes **5** are clearly used together in Figure 1, since bottom plates of anchor member **6** are clearly not shown and thus such embodiment is not disclosed within Figure 1);

a plurality of posts **1**, each post having a first diameter being smaller than the internal diameter of each hollow stake sleeve (posts **1** clearly have a diameter smaller than that of stakes **5** since post **1** is received within stake **5** as shown in Figure 2), any

one of the posts slidably, interchangeably inserting into and being frictionally and removably retained by any one of the stakes sleeves (Examiner notes that ornament **3** is removably, frictionally received in post **1** as shown cross-sectional view in Figure 5; page 1 lines 31-54. In that the cross-sectional view of the engagement between ornament **3** and post **1** is identical to the cross-sectional view of the engagement between post **1** and stake **5**, as shown in Figure 2, it is readily apparent that posts **1** are also removably, frictionally received within stakes **5**. Clearly, each of posts **1** and each of stakes **5** are identical and post **1** may be interchangeably inserted into any one of stakes **5**; Figures 1 and 2); and

a plurality of structural fencing components **8,9**, each fencing component including a post attachment collar **11,15** disposed on an edge thereof, the post attachment collar having an annular opening therethrough, the annular opening having a second diameter larger than the first diameter of each post, any one of the fencing components slidably, pivotally, removably , and interchangeably attaching to any one of the posts, to thereby connect adjacent structural fencing components to each other while allowing the fencing components to be rotationally adjusted relative to the posts (post attachment collar **11,15** has an opening allowing fencing components to be rotationally adjusted relative to post **1**, prior to tightening of bolts **13,17**; Figures 1, 2 and 4-6).

As to claim 2, Carlson discloses a system wherein the structural fencing components **8,9** are selected from the group consisting of base units, gate units and end units (Figure 1).

Examiner notes that claim 2 only requires that the structural fencing component is one of the group consisting of base units, gate units and end units; claim 2 does not positively claim that the structural fencing components comprise one of each of such group of components.

As to claim 10, Carlson discloses a system wherein the posts **1** and the structural components include decorative accents **3** (Figure 1).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 11-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carlson in view of Gibbs et al. (US 6,811,145).

As to claims 11 and 13, Carlson fails to disclose a system wherein the structural components and the posts are manufactured from tubular steel and wherein the structural components and the posts are covered with a powder coated finish.

Gibbs et al. teach a fencing system wherein structural components and posts are manufactured from tubular steel and wherein the structural components and the posts are covered with a powder coated finish; the steel material providing for a strong, durable fence element, and the powder coated finish providing for enhanced corrosion resistance (column 2 lines 22-34). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the system

disclosed by Carlson to have components manufactured from powder coated tubular steel as taught by Gibbs et al. in order to provide for a strong, durable fence element having enhanced corrosion resistance.

As to claim 12, Carlson discloses a system wherein the structural components are welded in assembly.

As to claim 14, Carlson discloses a system wherein the structural components, posts **1** and stakes **5** are removably attached to each other by frictional contact therebetween (Figure 2).

As to claim 15, Carlson discloses a system wherein a stake **5** is wedge-shaped, and a stake sleeve comprises a cylindrical cavity therein (Figure 2).

Claims 1-10 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ravert (US 1,426,215) in view of Carlson.

As to claim 1, Ravert discloses a fencing system comprising:

a plurality of footings **12** configured to be fastened to the ground;

a plurality of posts **B**, each post being adapted to be retained by the footing; and

a plurality of structural fencing components, each fencing component including a post attachment collar **6,7** disposed on an edge thereof, the post attachment collar having an annular opening therethrough, the annular opening having a second diameter larger than a first diameter of each post, any one of the fencing components slidably, pivotablly, removably, and interchangeably attaching to any one of the posts, to thereby connect adjacent structural fencing components to each other while allowing the fencing components to be rotationally adjusted relative to the posts (Figures 1 and 4).

Ravert discloses a system comprising footings adapted to be fastened to the ground, and posts being adapted to be retained by the footings instead of stakes including a hollow stake sleeve having an internal diameter; and a posts having a first diameter being smaller than the internal diameter of each hollow stake sleeve, any one of the posts slidably, interchangeably insertion into and being frictionally and removably retained by any one of the stake sleeves.

Carlson teaches a fencing system comprising either a footing **6** adapted to be fastened to the ground, and a post **1** being adapted to be retained by the footing, *or* comprising a stake **5** including a hollow stake sleeve having an internal diameter, and a post having a first diameter being smaller than the internal diameter of each hollow stake sleeve (posts **1** clearly have a diameter smaller than that of stake **5** since post **1** is received within stake **5** as shown in Figure 2), any one of the posts slidably, interchangeably inserting into and being frictionally and removably retained by any one of the stakes sleeves (Examiner notes that ornament **3** is removably, frictionally received in post **1** as shown cross-sectional view in Figure 5; page 1 lines 31-54. In that the cross-sectional view of the engagement between ornament **3** and post **1** is identical to the cross-sectional view of the engagement between post **1** and stake **5**, as shown in Figure 2, it is readily apparent that posts **1** are also removably, frictionally received within stakes **5**. Clearly, each of posts **1** and each of stakes **5** are identical and post **1** may be interchangeably inserted into any one of stakes **5**; Figures 1 and 2). Inasmuch as the references disclose footings and stakes as art recognized functional equivalents for securely fastening a fence post to the ground, it would have been obvious to one of

ordinary skill in the exercise art to substitute one for the other. In re Fout, 675 F.2d 297, 301, 213 USPQ 532, 536 (CCPA 1982).

As to claim 2, Ravert discloses a system wherein the structural fencing components are selected from the group consisting of base units, gate units and end units (Figure 1).

As to claim 3, Ravert discloses a system wherein the base units **A** include a vertical element **8** on either side thereof, and wherein the post attachment collars **6,7** are disposed on the vertical elements (Figure 3).

As to claim 4, Ravert discloses a system wherein the post attachment collars **6,7** comprise a pair of post rings disposed at the top and bottom of both of the vertical elements **8** (Figure 3).

As to claim 5, Ravert discloses a system wherein the gate units comprise a pair of complementary doors **D** each having an outside edge, wherein the outside edges terminate in a vertical element **15** and wherein the post attachment collars **6,7** are disposed on the vertical elements (Figures 2 and 4).

As to claim 6, Ravert discloses a system wherein the post attachment collars **6,7** comprise a pair of post hinges disposed at the top and bottom of the vertical elements **15**, the post hinges including a post ring and a hinge element to allow the complementary doors **D** to open and close (Figures 2 and 4).

As to claim 7, Ravert discloses a system wherein the end units **A** include a vertical element **8** on one side thereof and wherein the post attachment collars **6,7** are disposed on the vertical elements (Figure 3).

As to claim 8, Ravert discloses a system wherein the post attachment collars **6,7** comprise a pair of post rings disposed on the top and bottom the vertical element **8** (Figure 3).

As to claim 9, Ravert discloses a system wherein the end unit **A** includes a stake pin **14** disposed on the side opposite the vertical element, the stake pin being adapted to being inserted into the ground so as to anchor the end unit in position (Figure 4).

As to claim 10, Ravert discloses a system wherein the posts **B** and the structural components include decorative accents (Figure 4).

As to claims 16, Ravert discloses a fencing system comprising:

a footing **12** configured to be fastened to the ground;

a cylindrical post **B**, the post being adapted to be retained by the footing; and

a structural fencing component including a post attachment collar **6,7** disposed on an edge thereof, the post attachment collar having an annular opening therethrough with a second diameter larger than a first diameter of the post, the fencing component slidably, rotatably and removably attaching to the post to thereby connect adjacent structural fencing components to each other while allowing the fencing components to be rotationally adjusted relative to the post, the structural fencing component being chosen from the group consisting of interchangeably base units, interchangeably gate units and interchangeable end units, wherein:

the base units **A** include a vertical element **8** on either side thereof, and wherein the post attachment collar comprises pair of post rings disposed at the top and bottom of both of the vertical elements;

the gate units **D** comprise a pair of complementary doors each having an outside edge, wherein the outside edges terminate in a vertical element and wherein the post attachment collar **6,7** comprise a pair of post hinges disposed at the top and bottom of the vertical elements, the post hinges including a post ring and a hinge element to allow the complementary doors to open and close; and

the end units **A** include a vertical element **8** on one side thereof, wherein the post attachment collar **6,7** comprise a pair of post rings disposed at the top and bottom of the vertical element, and further wherein the end unit further includes a stake pin **14** disposed on the side opposite the vertical element, the stake pin being adapted to being inserted into the ground so as to anchor the end unit in position (Figures 1-4).

Ravert discloses a system comprising a footing adapted to be fastened to the ground, and a post being adapted to be retained by the footing instead of a wedge-shaped stake including a stake sleeve comprising a cylindrical cavity within the stake, the stake sleeve having an internal diameter; and a cylindrical post having a first diameter smaller than the internal diameter of the hollow stake sleeve, the post slidably inserting into and being frictionally and removably retained by the stake sleeve.

Carlson teaches a fencing system comprising a footing **6** adapted to be fastened to the ground, and a cylindrical post **1** being adapted to be retained by the footing, *or* a wedge-shaped stake **5** including a stake sleeve comprising a cylindrical cavity within the stake, the stake sleeve having an internal diameter, and a cylindrical post having a first diameter smaller than the internal diameter of the hollow stake sleeve (posts **1** clearly have a diameter smaller than that of stake **5** since post **1** is received within stake **5** as

shown in Figure 2), the post slidably inserting into and being frictionally and removably retained by the stake sleeve (Examiner notes that ornament **3** is removably, frictionally received in post **1** as shown cross-sectional view in Figure 5; page 1 lines 31-54. In that the cross-sectional view of the engagement between ornament **3** and post **1** is identical to the cross-sectional view of the engagement between post **1** and stake **5**, as shown in Figure 2, it is readily apparent that posts **1** are also removably, frictionally received within stakes **5**). Inasmuch as the references disclose footings and stakes as art recognized functional equivalents for securely fastening a fence post to the ground, it would have been obvious to one of ordinary skill in the exercise art to substitute one for the other. In re Fout, 675 F.2d 297, 301, 213 USPQ 532, 536 (CCPA 1982).

Claims 11-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ravert in view of Carlson as applied to claims 1-10 and 16 above, and further in view of Gibbs et al.

As to claims 11 and 13, Ravert in view of Carlson fails to disclose a system wherein the structural components and the posts are manufactured from tubular steel and wherein the structural components and the posts are covered with a powder coated finish.

Gibbs et al. teach a fencing system wherein structural components and posts are manufactured from tubular steel and wherein the structural components and the posts are covered with a powder coated finish; the steel material providing for a strong, durable fence element, and the powder coated finish providing for enhanced corrosion resistance (column 2 lines 22-34). Accordingly, it would have been obvious to one

having ordinary skill in the art at the time the invention was made to modify the system disclosed by Ravert in view of Carlson to have components manufactured from powder coated tubular steel as taught by Gibbs et al. in order to provide for a strong, durable fence element having enhanced corrosion resistance.

As to claim 12, Ravert discloses a system wherein the structural components are welded in assembly.

As to claim 14, Carlson teaches a system wherein the structural components, posts **1** and stakes **5** are removably attached to each other by frictional contact therebetween (Figure 2).

As to claim 15, Carlson teaches a system wherein a stake **5** is wedge-shaped, and a stake sleeve comprises a cylindrical cavity therein (Figure 2).

(10) Response to Argument

Appellant's arguments filed December 20, 2007 have been fully considered but they are not persuasive.

As to claim 1, Appellant argues that:

> Carlson does not disclose a fencing system comprising a *plurality* of stakes configured to be driven into the ground; and a plurality of posts, each post having a first diameter being *smaller than the internal diameter of each hollow stake sleeve, any one of the posts slidably, interchangeably inserting into and being frictionally and removably retained by any one of the stakes sleeves*.

Examiner disagrees. As to claim 1, Carlson discloses a fencing system comprising:

a plurality of stakes **5** configured to be driven into the ground (a plurality of stakes **5** are clearly used together in Figure 1, since bottom plates of anchor member **6** are clearly not shown and thus such embodiment is not illustrated within Figure 1); and

a plurality of posts **1**, each post having a first diameter being smaller than the internal diameter of each hollow stake sleeve (posts **1** clearly have a diameter smaller than that of stake **5** since post **1** is received within stake **5** as shown in Figure 2), any one of the posts slidably, interchangeably inserting into and being frictionally and removably retained by any one of the stakes sleeves (Examiner notes that ornament **3** is removably, frictionally received in post **1** as shown cross-sectional view in Figure 5; page 1 lines 31-54. In that the cross-sectional view of the engagement between ornament **3** and post **1** is identical to the cross-sectional view of the engagement between post **1** and stake **5**, as shown in Figure 2, it is readily apparent that posts **1** are also removably, frictionally received within stakes **5**. Clearly, each of posts **1** and each of stakes **5** are identical and post **1** may be interchangeably inserted into any one of stakes **5**; Figures 1 and 2).

Examiner notes that the Appellant seems to be speculating about the drawings in an effort to overcome the rejection. Appellant speculates that since the Carlson reference does not explicitly state that posts **1** are slidably inserted into and frictionally and removably retained by stakes **5** that such elements are thus fixedly engaged.

Examiner disagrees. Examiner notes that ornament **3** is removably, frictionally received in post **1** (Figure 5, page 1 lines 31-54). In that the cross-sectional view of the engagement between ornament **3** and post **1** is identical to the cross-sectional view of

the engagement between post **1** and stake **5**, as shown in Figure 2, it is readily apparent that posts **1** are also removably, frictionally received within stakes **5**.

Appellant speculates that since the Carlson reference does not explicitly state that the cross-sectional shape of each post **1** and each stake **5** are identical that such elements are not interchangeable engaged.

Examiner disagrees. The drawings are good for that they show, in that Figure 1 clearly shows that each of post **1** and each of stake **5** are identical.

As to claim 2, Appellant argues that:

Carlson does not disclose a system wherein the structural fencing components are *selected from the group consisting of base units, gate units and end units*.

Examiner disagrees. As to claim 2, Carlson discloses a system wherein the structural fencing components **8,9** are selected from the group consisting of base units, gate units and end units (Figure 1).

Examiner notes that claim 2 only requires that the structural fencing component is one of the group consisting of base units, gate units and end units; claim 2 does not positively claim that the structural fencing components comprise one of each of such group of components.

As to claims 1 and 16, Appellant argues that:

Carlson does not teach a system comprising a wedge-shaped stake including a stake sleeve comprising a cylindrical cavity within the stake, the stake sleeve having an internal diameter; and a cylindrical post having *a first diameter smaller*

than the internal diameter of the hollow stake sleeve, the post slidably inserting into and being frictionally and removably retained by the stake sleeve.

Examiner disagrees. As to claims 1 and 16, Carlson teaches a fencing system comprising a footing **6** adapted to be fastened to the ground, and a cylindrical post **1** being adapted to be retained by the footing, *or* a wedge-shaped stake **5** including a stake sleeve comprising a cylindrical cavity within the stake, the stake sleeve having an internal diameter, and a cylindrical post having a first diameter smaller than the internal diameter of the hollow stake sleeve (posts **1** clearly have a diameter smaller than that of stake **5** since post **1** is received within stake **5** as shown in Figure 2), the post slidably inserting into and being frictionally and removably retained by the stake sleeve (Examiner notes that ornament **3** is removably, frictionally received in post **1** as shown cross-sectional view in Figure 5; page 1 lines 31-54. In that the cross-sectional view of the engagement between ornament **3** and post **1** is identical to the cross-sectional view of the engagement between post **1** and stake **5**, as shown in Figure 2, it is readily apparent that posts **1** are also removably, frictionally received within stakes **5**). Inasmuch as the references disclose footings and stakes as art recognized functional equivalents for securely fastening a fence post to the ground, it would have been obvious to one of ordinary skill in the exercise art to substitute one for the other. In re Fout, 675 F.2d 297, 301, 213 USPQ 532, 536 (CCPA 1982).

Examiner acknowledges the affidavit entitled Declaration of Paul L. Gossling, dated November 20, 2006. Examiner notes that the declaration fails to present any evidence or support as to how Garden Zone's sales profit numbers relate to the

competing products on the market in regards to the number of units sold, the pricing, and the advertising of products sold. Such standalone sales profit numbers fail to indicate the product's share of the market or the true source of the commercial success of the invention, whether such success is a result of superior advertising, a more affordable product, or the novelty of the invention. The declaration fails to provide any evidence or support as to the alleged long-felt need within the industry which is solved by the invention and thus has resulted in such commercial success. Furthermore, Examiner notes that the declaration fails to provide any evidence as to the numerous comments from distributors and customers indicating the fulfillment of such long-felt need. Accordingly, the affidavit is not persuasive.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Michael P. Ferguson/
Examiner, Art Unit 3679

/Daniel P. Stodola/
Supervisory Patent Examiner, Art Unit 3679

Conferees:
Michael P. Ferguson, Examiner /MPF/
Daniel P. Stodola, Supervisory Patent Examiner /dps/
Meredith C. Petravick, Appeals Specialist /mcp/